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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' BRIEF

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TOPICAL INDEX

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 8

ARGUMENT

I. The State Court did not purport to enforce the National Labor Relations Act, but rather common law principles 10

II. The purpose of the National Labor Relations Act is to prevent conduct defined to be an unfair labor practice, not to immunize it from all regulation 14

III. The intent of Congress cannot be carried out by immunizing from regulation the conduct Congress sought to wipe out 18

A. The act itself contains nothing indicating any intent by Congress to foreclose state action. 18

B. The legislative history of the Act indicates that Congress did not intend any such restriction on the power of the state 24

C. Allowing the states to act will further, not hinder the purposes of the Act 30

1. State action will assist in carrying out the federal pattern of regulation 31

TOPICAL INDEX
(Continued)

Page

2. State action is necessary to carry out the Act's policy of protecting employee activities. 33

3. State action in cases where the Board declines to accept jurisdiction will not destroy the "balance of the Act." 36

4. Confusion will be avoided by permitting the state to act. 37

IV. The declining of jurisdiction by the Board is in effect a holding that the case should be left to state action. 38

V. The contention of the petitioners raises serious constitutional questions. 39

VI. The judgment for damages is clearly justified under the prior decisions of this court. 41

VII. The Board did decline to exercise jurisdiction 42

CONCLUSION 46

Appendix A (Constitutional provisions, statutes and regulations) 47

Appendix B (N.L.R.B. jurisdictional standards) 52

Appendix C (Excerpts from brief for the United States as amicus curiae in *Bethlehem Steel Co.* v. *New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. ed. 1234) 55

TABLE OF AUTHORITIES

Cases

Page

Adams Motors, Inc., (1948), 80 N.L.R.B. 1518 23

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board (1949), 336 U.S. 301, 93 L. ed. 691 ..... 13, 17

Allen-Bradley Local v. Wisconsin Employment Relations Board (1942), 315 U.S. 740, 86 L. ed. 1154 ..... 13, 17, 19, 26, 32, 34

John Almeida, Jr., dba Almeida Bus Service (1952), 99 N.L.R.B. 498 44

Bethlehem Steel Company v. New York State Labor Relations Board (1947), 330 U.S. 767, 91 L. ed. 1234 ..... 19, 21, 26, 27, 55

C. A. Braukman, et al, dba Screw Machine Products Co. (1951), 94 N.L.R.B. 1609 42

Breeding Transfer Co. (1954), 110 N.L.R.B. 493 ..... 25, 43

Building Trades Council v. Kinard Construction Co. (1954), 346 U.S. 933, 98 L. ed. 423 ..... 16, 27

Consolidated Edison Company v. National Labor Relations Board (1938), 305 U.S. 197, 83 L. ed. 126 ..... 26, 40

Dorn's House of Miracles, Inc. (1950), 91 N.L.R.B. 632 43

Federal Dairy Co., Inc. (1950), 91 N.L.R.B. 638 43

Florida v. United States (1931), 282 U.S. 194, 75 L. ed. 291 40

Garner v. Teamsters, Chauffeurs & Helpers Local Union (1953), 346 U.S. 485, 98 L. ed. 228 ..... 9, 16, 17, 27, 35

Gilvary v. Cuyahoga Valley R. Co. (1934), 292 U.S. 57, 78 L. ed. 1123 18

Hill v. Florida (1945), 325 U.S. 538, 89 L. ed. 1782 34

International Union v. Wisconsin Employment Relations Board (1949), 336 U.S. 245, 93 L. ed. 651 ..... 13, 17

James v. Marinship (1944), 25 Cal. 2d 721, 155 Pac. 2d 329 10

TABLE OF AUTHORITIES (Continued)

Cases (Continued)

Page

Kaiser-Frazer Parts Corp. (1948), 80 N.L.R.B. 1050 23

Ken-Rad Tube and Lamp Corp. (1945), 62 N.L.R.B. 21 12

J. R. Knott, et al, dba Hogue & Knott Supermarkets (1954) 110 N.L.R.B. 543 43

Midwest Piping and Supply Co., Inc. (1945), 63 N.L.R.B. 1060 12

Myers v. Bethlehem Shipbuilding Corp. (1938), 303 U.S. 41, 82 L. ed. 638 44

National Labor Relations Board v. Guy F. Atkinson Co. (1952), 195 Fed. 2d 141 43

National Labor Relations Board v. Denver Building and Construction Trades Council (1951), 341 U.S. 675, 95 L. ed. 1284 38

National Labor Relations Board v. Fainblatt (1939), 306 U.S. 601, 83 L. ed. 1014 37

National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937), 301 U.S. 1, 81 L. ed. 893 40

Park & Tilford Import Corp. (1945), 47 N.L.R.B. 411 12

Park & Tilford Import Corp. v. International Brotherhood of Teamsters (1946), 27 Cal. 2d 599, 165 Pac. 2d 891 10

Polish National Alliance v. National Labor Relations Board (1944), 322 U.S. 643, 88 L. ed. 1509 ..... 37, 38

Punch Press Repair Corp. (1950), 89 N.L.R.B. 614 23

Sinnot v. Davenport (1859), 63 U.S. (22 How.) 227, 16 L. ed. 243 18

Steele v. Louisville & Nashville Railroad Co. (1944), 323 U.S. 192, 89 L. ed. 173 45

United Construction Workers v. Laburnum Construction Corp. (1954), 347 U.S. 656, 98 L. ed. 1025 ..... 9, 41

TABLE OF AUTHORITIES (Continued)

Statutes

Page

Labor Management Relations Act, Section 303 (Title 29, U.S. Code, Section 187) 41

National Labor Relations Act (Title 29, U.S. Code, Section 151, et seq.) (61 Stat. 136) 1, 11, 19, 36, 39

National Labor Relations Act, Section 1 (Title 29, U.S. Code, Section 151) 8, 15, 48

National Labor Relations Act, Section 7 (Title 29, U.S. Code, Section 157) 8, 34, 48

National Labor Relations Act, Sections 8(a)(1) and 8(a)(3) (Title 29, U.S. Code Sections 158(a)(1) and 158 (a) (3)) 12, 48

National Labor Relations Act, Section 8(b)(2) (Title 29, U.S. Code, Section 158(b)(2)) 12, 49

National Labor Relations Act, Sections 9(a) and 9(c) (Title 29, U.S. Code, Sections 159(a) and 159(c) 8, 49

National Labor Relations Act, Section 10(a) (Title 29, U.S. Code, Section 160(a)) 16, 21, 28, 50

Norris-La Guardia Act (Title 29, U.S. Code, Sections 101 et seq.) 30

Constitutional Provisions

Constitution of the United States, Art. 1, Sec. 8 ..... 2, 40, 47

Constitution of the United States, Fifth Amendment 2, 41, 47

Constitution of the United States, Tenth Amendment 2, 41, 48

Regulations

Title 29, Code of Federal Regulations, Sections 6 and 101.17 ..... 2, 42, 49

Miscellaneous

American Law Institute
Restatement of Torts, Sections 766 and 794 11

National Labor Relations Board, N.L.R.B.

TABLE OF AUTHORITIES (Continued)

Miscellaneous (Continued)

Page

Jurisdictional Standards 6, 25, 42, 52

100 Cong. Rec. 5826, 5832, 5840, 5994, 6202 29

Senate Bill 2650, 83rd Congress 28

Senate Report No. 986, 80th Congress, 2nd Session Part 1 28

Senate Report No. 1211, 83rd Congress, 2nd Session 29

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Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' BRIEF

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Petitioners assert that the statutory provisions involved are the National Labor Relations Act, Title 29, U. S. Code, Section 151, et seq., (61 Stat. 136), but they do not set forth any provisions of this statute. Also involved in petitioners' asserted Question No. 4 (Our Question No. 2, *infra*) are certain of the regulations

issued by the National Labor Relations Board, published in 13 F.R. 3090 and 16 F.R. 1934, specifically those contained in Title 29 of the Code of Federal Regulations, Sections 6 and 101.17, and certain official announcements of the National Labor Relations Board stating under what circumstances it will exercise its jurisdiction.

While the decision below does not raise any constitutional questions, the rule contended for by petitioners would cause serious questions under Article I, Section 8, of the United States Constitution, and the Fifth and Tenth Amendments to the Constitution.

Pertinent portions of these Constitutional provisions, statutes, and regulations are set forth in Appendix A to this brief.

QUESTIONS PRESENTED

Respondents believe that only two questions are properly presented by the petition for certiorari and the record. Somewhat restated in what we believe to be the interest of precision, they are as follows:

1. May a state court enjoin coercive activity constituting an unfair labor practice and a tort under state law carried on against an employer whose business affects commerce when the National Labor Relations Board has refused to exercise jurisdiction over the case on the ground that the amount of business done by respondents affecting interstate commerce was insufficient for the Board to assert jurisdiction?

2. May the state court enjoin such conduct where the Board has officially announced that it will decline to exercise its jurisdiction over such employers and the Board's Regional Di-

rector, acting under authority duly delegated to him, has actually dismissed a representation proceeding on that ground, and where in the light of the Board's pronouncement it would obviously have been futile to appeal his decision to the Board or to file unfair labor practice charges?

These two questions are in substance petitioners' Questions 1 and 4.

Petitioners in their petition and in their opening brief assert that two other questions are presented. One is petitioners' Question 2 which reads as follows:

> "If the answer to (1) is in the affirmative, may a State Court do so on grounds the picketing though lawful under State Law is an unfair labor practice under the Act?"

This question is not presented in the case because the trial court did not enjoin the conduct of petitioners on the ground that it was an unfair labor practice under the National Labor Relations Act, nor did the Supreme Court of California hold the conduct lawful under the state law or affirm the injunction on the ground that the conduct was an unfair labor practice under that Act.

Petitioners also assert that there is a question presented which they designate as their Question No. 3. It is as follows:

> "If the answers to (1) and (2) are in the affirmative may a State Court do so where the alleged unfair labor practice consists of picketing for a union shop by a union not 'designated' by the Board when the Board has declined to hold a representation election and the State of California has no statutory procedure for doing so?"

This question is not presented by the record, for the reason, among others, that the state court did not enjoin the union on the ground that it had not been "designated" by the Board, but rather on the ground that it had not been "designated" by the employees. Also, it is not true that the State of California has no procedure for determining questions of representation. There is, it is true, no statutory election procedure, but an election is not the only method of determining questions of representation, and moreover, there is no showing that the trial court could not or would not have held an election had it been asked to do so. This asserted question was not presented to any of the courts below in any form.

All of the questions asserted by petitioners are questions of the *power* of the state to issue any injunctive relief, and not of the correctness of its decision on the merits that such conduct should be enjoined.

STATEMENT OF THE CASE

The record in the present case reveals a particularly flagrant case of an attempt to compel employers to sign a contract with a union which does not represent the employees and thereby force the employees into the union, wholesale and against their wills.

Respondents are two brothers and the son of one of them engaged as partners in carrying on a retail lumber business in Escondido, California. (R. 82.). They have eight employees. (R. 82.) One of petitioners is the San Diego Building Trades Council, an organization of labor unions in the building trades. (R. 13, 225.) Another is Building Material and Dump Truck Drivers Local No. 36, a local of the International Brotherhood of

Teamsters. (R. 300.) The third is Millmen's Union, Local 2020, a local union of the International Brotherhood of Carpenters and Joiners. (R. 256.)

The petitioners presented no evidence that any of these employees had designated any of the unions as his collective bargaining representative, and none of them had been designated or was the collective bargaining representative of the employees. (Paragraph IV of Findings of Fact, R. 14.) Nevertheless, the petitioners sought to compel the respondents to sign a contract which would have constituted them the representative of these employees and which contained, among other things, a union shop provision. (Paragraph IV of Findings of Fact, R. 13.)

The Supreme Court of California, in accordance with the unchallenged findings of the Trial Court, summarized the attack of these organizations upon respondents and their eight employees as follows:

> "The intent of the unions was not to induce the employees to join one of them, nor to provide education or information as to the benefits of unionization. The only purpose was to force the company to execute the agreement or suffer destruction of its business. In addition to picketing, union agents followed the company's trucks and threatened persons about to enter its place of business with economic injury. By this conduct, and the use of language calculated to instill fear of such injury, the unions induced building contractors to discontinue their patronage of the company, with consequent damage to the business amounting to $1,000.00." (R. 45.)

This statement is based on and summarizes Paragraphs VII,

VIII and IX of the Findings of Fact. (R. 14, 15.)

The decree of which petitioners complain does not prohibit them from seeking to invite the employees to join the union but only from seeking to injure respondents for a purpose concededly unlawful. (R. 25.)

The Supreme Court of California held that under the circumstances presented, such activities "were not privileged under the California law" (R. 52) and therefore were enjoinable if, as the court held, the state courts had jurisdiction. It is this question of jurisdiction which is now presented to this Court.

The record shows also that the respondents were denied relief by the National Labor Relations Board, which declined on policy grounds to exercise its jurisdiction in the case. (R. 16, 191; Exhibit 5, R. 192, 196.)

Petitioners do not state the reasons given for the refusal of the National Labor Relations Board to take jurisdiction. The reason is set forth in the opinion below but for the convenience of the Court it will be set forth again here. It was that "in view of the scope of the business operation involved it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings . . ." (R. 49; Exhibit 5, R. 192, 196.) This ruling followed a letter informing respondents that such action was contemplated because "The amount of business done by Valley Lumber Company in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions." (R. 49; Exhibit 5, R. 192, 196.)

This refusal was in accordance with the announced policy of the Board in cases involving employers such as the respondents. (R. 16; Exhibit 5, R. 192, 196.) The Board's announcement of this policy is set out in Appendix B to this brief. The Supreme

Court of California in accordance with the trial court's finding (R. 13) noted that in any event no more than $250,000.00 worth of goods per year came from interstate commerce and that therefore a request for a review of the action of the Regional Director would have been futile in the light of the Board's rulings and statement of policy referred to in the opinion. (R. 49.) No other connection with interstate commerce appears from the record.

It is necessary to correct an assertion in Petitioner's Opening Brief (p. 4) that respondents alleged they were engaged in interstate commerce. This statement is wholly contrary to the record. After setting forth the facts about purchases of goods coming from out of state, the pleadings and findings merely state that the business of the petitioners "affects" interstate commerce. (R. 2, 16.)

In their statement of the case, petitioners assert that since the State of California has no statutory administrative procedure for union designation, the decree of the trial court, in effect, enjoined picketing until such time as the Board should assume jurisdiction, determine the appropriate unit, order the election, and certify the results thereof.

This is both incorrect and immaterial.

It is immaterial because the questions presented to this Court, as stated both by petitioners and respondents, do not turn upon the precise *scope* of the decree entered by the trial court (or even the propriety, as a matter of substantive law, of granting any relief at all), but rather upon the jurisdiction of the state courts. No question of the scope of the order was presented to or decided by any lower court.

It is untrue because the decree did not have the effect so attributed to it. The decree simply used the phrase "properly des-

ignated." (R. 25). In the terminology of the National Labor Relations Act (Section 9(a) and 9(c)), a union is designated by the employees and the Board does nothing more than "certify the results" of elections. (Title 29, U.S. Code, Sec. 159, Subdivisions (a) and (c).) The illegality presented by the pleadings (contrary to the statement by petitioners at p. 4 of their brief), was that the petitioners had not been designated by the employees. (Paragraph IV of the complaint, R. 3.) The finding of the trial court on the subject of designation is that "None of the defendants has offered or produced any evidence that any employee of plaintiffs has designated any of said unions as his collective bargaining representative." (Paragraph IV of the Findings, R. 14.) The Supreme Court of California used almost identical language. (R. 44.) The decree, therefore, was clearly intended to and did refer only to designation by the employees, not designation by the Board.

SUMMARY OF ARGUMENT

The argument of petitioners is based on the assumption that the conduct in which they engaged was an unfair labor practice. The court below correctly held that it was also a tort. Since the respondents' activities were clearly not ones protected by the Act, there is no possible question of conflict between the decree and the federal law.

The purpose of the National Labor Relations Act as stated by Congress in Section 1 of the Act itself is, among other things, to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing (including the right guaranteed under Section 7 of the

Act (Title 29, U. S. Code, Section 157) to refrain from such activities.) Section 1 further states that the elimination of certain practices by unions is a necessary prerequisite to the assurance of these rights.

The acts of petitioners constituted conduct of the type which must be so eliminated. To the extent that the states eliminate such conduct they further the purposes of the Act.

The intent of Congress to eliminate such conduct cannot be furthered by creating a rule which would completely immunize that conduct from any regulation in cases where the National Labor Relations Board decides that the industry involved does not have a sufficiently close relationship to interstate commerce to justify it in exercising jurisdiction. There is nothing in the Act or in its history to indicate that Congress actually had the least intention of immunizing such conduct in such cases, and for this Court to immunize it would to that extent frustrate the intent of Congress. The action of the state court in this case actually furthers the purposes of the Act. As this Court recognized in *Garner v. Teamsters Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228 and in other cases, the reasons for holding in the Garner case that the National Labor Relations Board has exclusive jurisdiction to prohibit conduct forbidden by the National Labor Relations Act do not apply where the National Labor Relations Board refuses to act on such a ground as that relied upon by it in this case. The act of the Board in declining jurisdiction is in effect an adjudication that there is no basis in the particular case for excluding state action.

The judgment for damages was proper for the additional reasons set forth by this Court in *United Construction Workers v. Laburnum Construction Corp.* (1954), 347 U.S. 656, 98 L. ed.

1025.

If Congress had intended to forbid the states to act in an area where the federal interest is too slight to justify the federal agencies in even considering the case, the Constitution would furnish no support to the legislation.

The refusal of the Board through its Regional Director to exercise jurisdiction in the related representation proceeding was equivalent to a ruling by the Board that it would not accept jurisdiction of any phase of the case, and in any event, the announcements of the Board that it would not accept jurisdiction in such cases were intended to be and were notice to all that they need not apply to the Board for relief.

ARGUMENT

THE STATE COURT DID NOT PURPORT TO ENFORCE THE NATIONAL LABOR RELATIONS ACT, BUT RATHER COMMON LAW PRINCIPLES.

The courts below found that the conduct of the respondents violated *both* the state *and* the federal law. As to the state law, it appears from the opinion below that similar conduct was held unlawful in California in *Park & Tilford Import Corp. v. International Brotherhood of Teamsters* (1946), 27 Cal. 2d 599, 165 Pac. 2d 891, which was decided at a time when no conduct of a union was stigmatized by the National Labor Relations Act as an unfair labor practice.

The court below followed the Park & Tilford case and *James v. Marinship* (1944), 25 Cal. 2d 721, 155 Pac. 2d 329, and did not purport to base its decision on the fact that the conduct enjoined was an unfair labor practice. Respondents at all stages of

the proceedings questioned that the conduct was an unfair labor practice. Petitioners contended that it was. The court below, though stating that it was one, cited that fact, at most, as bearing upon the question of common-law privilege, and rested its decision on common-law principles.

The common-law rule enforced in this case is simply the general rule stated in the Restatement of Torts, Section 766, that with certain exceptions:

> ". . . One who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or
>
> (b) enter into or continue a business relation with another
>
> is liable to the other for the harm caused thereby."

The specific application of the principle to situations such as the present is found in Section 794 of the Restatement, which reads as follows:

> "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

The reason why the union conduct is unlawful is that it would compel the employer to perform an act that was forbidden by the National Labor Relations Act even before its amendment by the Taft-Hartley Act. The injuncton below does not depend upon the fact that the union conduct is itself forbidden by the National Labor Relations Act, and the Park & Tilford case cited supra

shows that such conduct was expressly held to be wrongful under California law before the Taft-Hartley Act was passed and at a time when the National Labor Relations Act placed no restrictions upon unions. The decision below in its essence does not depend on the fact that the conduct enjoined was an unfair labor practice; it was based rather upon the fact that an *employer* subject to the Act is guilty of an unfair labor practice if he signs such a contract under such circumstances. This is what was held in the Park & Tilford case.

The conduct which the petitioners were found guilty of engaging in was seeking to compel respondents, by means of picketing and economic pressure, to recognize petitioners as the representatives of respondents' employees and sign a union shop contract with petitioners, all of which would have been clearly in violation of the National Labor Relations Act, since petitioners were not the representatives of respondents' employees. It cannot be doubted that the mere execution of such a contract by an employer subject to the Act would be an unfair labor practice, under Sections 8(a)(1) and 8(a)(3) of the Act. See *Ken-Rad Tube and Lamp Corp.* (1945), 62 N.L.R.B. 21; *Park & Tilford Import Corp.* (1945), 47 N.L.R.B. 411, 414; *Midwest Piping and Supply Co., Inc.* (1945), 63 N.L.R.B. 1060.

Though the recognition of a union not designated by the employees and the execution of such a contract with it would clearly be an unfair labor practice, it is perhaps not so clear that picketing to compel the employer to do so is also an unfair labor practice. Section 8(b) (2) may cover the situation in part, but there is little authority on the point. The respondents at all stages of the proceedings below questioned that such conduct is a violation of that provision, and the petitioners have never cited a case

on the point. The Supreme Court of California said that such conduct was a violation of that section and we do not at this time quarrel with that view.

We nevertheless call the matter to the attention of this Court because the entire argument of petitioners rests upon it. Since it is not questioned that the execution of such a contract would be unlawful under the National Labor Relations Act, it is clear that the attempt to compel its execution cannot be protected activity under that Act. Hence, if such an attempt is not directly prohibited by the Act, it is conduct which, being neither protected nor regulated by the Act, is under familiar principles subject to regulation by the state. *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. ed. 1154; *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 93 L. ed. 651; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board* (1949), 336 U.S. 301, 93 L. ed. 691.

Thus if, as respondents felt when the case was pending in the courts below, such conduct is not an unfair labor practice by the union, the case is at an end. This Court must find that it is an unfair labor practice in order to reach the questions raised by petitioners.

Although it is not true that the state court held the union's conduct to be lawful under state law and that it enjoined that conduct only because it violated the National Labor Relations Act, we may in the greater part of this brief discuss the law on the assumption that it were true, because we believe that if it were true it would be all the more necessary to affirm the judgment. Obviously, even if the state court had acted on the ground that

the picketing, though lawful under the state law, was an unfair labor practice under the Act, it would have been saying that as applied to such cases it would model its law upon the federal law. This raises no federal question but to the contrary eliminates any conceivable conflict with the policy of Congress. It has never been held that a state may not, if it chooses, model its law as applied to a particular situation upon the federal law, nor has it been held that it may not do this by judicial decision rather than by statute.

Here again, it must be emphasized that not only the questions presented, but the entire argument of petitioners is an attack on the jurisdiction of the state to act. The jurisdiction of a state or a state court, under the Constitution of the United States, is not ordinarily vitiated by the reason it gives for its action if the action itself is under the circumstances within its power.

The asserted fact that the conduct enjoined was in itself an unfair labor practice serves to emphasize the necessity of holding that the state court had power to act. Congress cannot have intended to create a situation where no law can be enforced because two laws are being violated.

II

THE PURPOSE OF THE NATIONAL LABOR RELATIONS ACT IS TO PREVENT CONDUCT DEFINED TO BE AN UNFAIR LABOR PRACTICE, NOT TO IMMUNIZE IT FROM ALL REGULATION.

The contention of the petitioners is that the conduct which they engaged in was conduct forbidden by the National Labor

Relations Act and that therefore the states had no power to prevent them from engaging in it.

Insofar as the activities of the unions are concerned the purpose of Congress in adopting the National Labor Relations Act is stated in Section 1 of the Act as follows:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.
>
> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (National Labor Relations Act, § 1, Title 29, U.S. Code § 151.)

Congress has thus declared that certain practices by unions tend to obstruct interstate commerce and that therefore these

practices, insofar as they interfere with the exercise by workers of full freedom of association, self-organization, and designation of representatives must be eliminated.

In order to carry out this purpose Congress conferred on the National Labor Relations Board authority to prevent such practices. (National Labor Relations Act, § 10; Title 29, U.S. Code, § 160.)

It also conferred on that Board the power to limit its own jurisdiction by refusing to entertain cases involving relatively small impact on interstate commerce. (See Part IV, *infra.*)

This Court has held that, though the Act "leaves much to the states" of their power over labor relations, Congress by the passage of the Act intended to deprive the states of their power to regulate practices forbidden by the Act and regulated by the Board. *Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228. As that decision was based upon the fear of conflict of orders and decrees of the state authorities with those of the Board, this Court took care to point out that the problem resulting from a refusal of the Board to exercise its jurisdiction was not involved. In the later case of *Building Trades Council v. Kinard Construction Co.* (1954), 346 U.S. 933, 98 L. ed. 423, the reservation of this question was even more emphatic.

There is no suggestion in any case, or anywhere in the Act, that Congress, by giving the Board power to decline to exercise its jurisdiction, intended to place above all law the very conduct expressly declared to be injurious and unlawful.

Such a holding would place an enormous number of small businesses such as that of respondents, and their employees, to say nothing of the unions representing or seeking to represent such employees, outside the pale of the law, and would deprive

them of protection which Congress has found necessary for the protection of larger and more powerful organizations and enterprises, as well as of whatever similar protections the various states have found it necessary or advisable to apply. To impute such an intent to Congress seems to us to border on scandalous disrespect to that body.

This Court recognized in the Garner case itself that if injurious conduct is "governable by the state or entirely ungovernable" it must be left to the power of the state to govern it. *Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U. S. 485, 488, 98 L. ed. 228, 238. This principle is clearly applicable to the present case.

Moreover, it is settled that conduct neither protected nor forbidden by the Act can be regulated by the states. *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. ed. 1154; *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 93 L. ed. 651; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board* (1949), 336 U.S. 301, 93 L. ed. 691. Therefore, the argument of petitioners reduces to the contention that *by the very act of forbidding this conduct,* Congress immunized it from all regulations.

We submit that this is a strange way of carrying out the intent of Congress. Congress considered the conduct injurious and wished to prevent it. Permitting the states to act will not guarantee that that intent will always be carried out; but forbidding them to act will guarantee that it will *not* be carried out.

III

THE INTENT OF CONGRESS CANNOT BE CARRIED OUT BY IMMUNIZING FROM REGULATION THE CONDUCT CONGRESS SOUGHT TO WIPE OUT.

A. *The Act itself contains nothing indicating any intent by Congress to foreclose state action.*

The brief of petitioners is an attempt to accomplish a most extraordinary *tour de force.* Stripped of the elaborate verbal machinery contained in their brief, petitioners' position is that by the very fact of finding certain conduct to be injurious and forbidding it, Congress intended to protect that very conduct from all regulation in a wide class of cases. The intention of Congress was clearly to the contrary.

Petitioners make little attempt to point to any particular provisions of the Act to show any such intent on the part of Congress but rather rely for the most part on legalistic arguments to show that Congress must be considered to have intended restrictions which it did not see fit to write expressly into the Act. Such arguments will not suffice, for this Court has frequently recognized that exclusion of state power is not to be lightly implied. See for example *Gilvary v. Cuyahoga Valley R. Co.* (1934), 292 U.S. 57, 60, 78 L. ed. 1123, 1126, in which this Court pointed out that the intention to exclude state power "will not be implied unless, when fairly interpreted, the Federal measure is plainly inconsistent with state regulation of the same matter." Long ago in *Sinnot v. Davenport* (1859), 63 U.S. (22 How.) 227, 243, 16 L. ed. 243, 247, this Court said:

"We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together . . ."

Examples of such language occur in cases interpreting the National Labor Relations Act. Thus in *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 749, 86 L. ed. 1154, 1164, this Court said:

"Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' "

Indeed, as applied to situations of the very type presented in this case, this Court has not been entirely silent.

The decision below is in full accord with the principle enunciated by this Court in *Bethlehem Steel Company v. New York State Labor Relations Board* (1947), 330 U.S. 767, 774, 91 L. ed. 1234, 1246:

"However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, [citation], or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, [citations]. The states are

in those cases permitted to use their police power in the interval."

It is true that the Court refrained from expressly applying this to action of the National Labor Relations Board in refusing to exercise jurisdiction in certain types of cases "for budgetary or other reasons." This undoubtedly was the only proper course for the Court to take, as the holding of the case was that the Board had in effect regulated the matter, and in a manner contrary to the rule the state board sought to enforce, so that the question of a refusal to act at all was not before the Court. The application of the principle to the present case is, however, plain. The Board has in this case decided that the controversy falls into a "separable or distinct" segment of the matter covered by the federal statute and that it chooses not to apply the federal regulation to that segment.

Petitioners argue (pp. 14, 15) that in the Bethlehem Steel case three Justices disagreed with the "suggestion" that this might be the appropriate result. To the contrary these Justices argued for an even wider scope to the power of the states, and in the language quoted by petitioners, in urging that the majority had drawn the line in the wrong place, contended that other cases should be treated like the present one by allowing the states to act in those other cases, not that the power should be denied in cases like the present. Moreover, these three Justices considered only a refusal induced by budgetary reasons. In the present case the National Labor Relations Board declined to act, not for budgetary reasons, or because it is on "short rations," but because it found that the purposes of the National Labor Relations Act would not be effectuated by its intervention. In effect, it found that the impact

of the situation on interstate commerce is too small to justify action by the Federal Government. Such a ruling necessarily implies that the interest of the Federal Government is likewise too slight to justify excluding action by the states, and if Congress has by implication authorized the Board to make and act on such a finding it must have authorized the implication inherent in it.

Petitioners throughout their brief refer to the powers given to the Board under Section 10(a) of the National Labor Relations Act (Title 29, U.S. Code, § 160(a)) to cede jurisdiction over certain industries to the state boards.

This authority was by its plain terms given to permit the Board to cede jurisdiction over entire industries in particular cases. As appears, for example, from the very instance which gave rise to it (See *Bethlehem Steel Company v. New York State Labor Relations Board, supra*), it applies to cases in which the Board would otherwise exercise jurisdiction. The majority in that case held that the states could not act in the field over which the Board had and would exercise jurisdiction but expressly refrained from including in its decision cases like the present. The minority succinctly and apparently correctly summed up the effect of the decision as follows:

> "Apart from the suggestion that the National Board's declination of jurisdiction 'in certain types of cases, for budgetary or other reasons' might leave room for the State in those situations, the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the

authority of the National Board." (330 U.S. at 778, 91 L. ed. at 1248).

Thus is stated the supposed rule and its exception. It was obviously the rule that Congress was in so much haste to change by adding a proviso to Section 10(a) of the Taft-Hartley Act, then under consideration. Clearly there was no emergency which required it to confirm the exception without delay.

By its terms Section 10(a) empowers the Board to cede jurisdiction over cases of such importance to the Federal system that the Board could not or would not refuse to exercise jurisdiction in the absence of such specific authority. Except in the case of the mining, manufacturing, transportation, and communications industries the power is not limited to cases predominantly local in character and even as to those industries, cases "predominantly local" in character might still have a pronounced effect on interstate commerce, clearly requiring the intervention of the National Board if it were not for the existence of a local board to which authority had been ceded and which could be counted on to handle the situation. This type of cession is permitted to extend, for example, to all wholesaling and jobbing operations, including those shipping largely or exclusively in interstate commerce, as well as to the great mail order houses and other activities constantly and directly engaged in interstate commerce in great volume. The section would obviously permit the Board to cede to a state agency its power over the vast majority of the entire business of distributing goods in interstate commerce, indeed to all such business carried on within the state, except that it could not, perhaps, cede jurisdiction over such business if carried on by manufacturing and mining concerns not predominantly local in

character, and it could not, of course, cede jurisdiction over the actual instrumentalities of commerce, such as common carriers (to the extent that they are subject to the National Labor Relations Act) and communications facilities. A statutory authority to cede jurisdiction over such activities obviously involves entirely different considerations from those applicable to cases, such as that of the small retailers involved in this case, over which the Board would in any event decline to exercise its jurisdiction because of a determination that the impact of the situation on interstate commerce was not sufficient to justify its action. If the situation is such that the Board would find its acceptance of jurisdiction necessary in the absence of a specific statutory authority to cede jurisdiction, obviously there are good reasons for requiring that the state conform to the federal law before the state authorities can be allowed to act, but where the case is of such small importance that the Board would not have taken it in any event, and in fact actually refused to take it, the necessity for such safeguards disappears. Restrictions properly applicable to the one situation cannot be supposed to have been intended by Congress to apply to the other.

The Board itself has clearly indicated its view that the proviso to Section 10(a) applies where its jurisdictional standards do not. Thus in *Punch Press Repair Corp.* (1950), 89 N.L.R.B. 614, *Adams Motors Inc.* (1948), 80 N.L.R.B. 1518, and *Kaiser-Frazer Parts Corp.* (1948), 80 N.L.R.B. 1050, the Board was asked for various reasons to decline jurisdiction in cases in which its jurisdictional policy then in effect required it to accept jurisdiction. It refused to do so on the ground that there was no cession agreement in effect under Section 10(a) which would permit it to decline jurisdiction. If these had been cases in which the Board

would as a matter of policy have declined jurisdiction, this question could not even have arisen, and these three cases show beyond question that the Board felt that its jurisdictional policy applied to an entirely different class of cases than did agreements that might be entered into under Section 10(a).

If any further evidence were needed that the proviso to Section 10(a) applies only to cases the Board would otherwise accept jurisdiction over, and is not intended to imply a limitation on the power of the state over cases over which the Board would not accept jurisdiction, it is found in the fact that the section applies only to unfair labor practice proceedings, not to representation proceedings. In cases over which the Board would decline jurisdiction anyway, there could be no reason not to permit cession agreements to cover representation matters also. Surely Congress cannot be supposed to have intended that questions of representation should remain wholly unresolved in such cases. The only possible explanation for this omission is that Congress believed the states already had power to deal with cases over which the Board would not accept jurisdiction, so that it was necessary to provide for cession agreements only to cover other classes of cases.

There is no possible way in which the decision below can controvene any actual or supposed policy or intent of Congress.

B. *The legislative history of the Act indicates that Congress did not intend any such restriction on the power of the state.*

The petitioners attempt to assert that legislative history indicates that Congress supports the position taken by them in this case. It is apparent from the statement of petitioners themselves that this asserted legislative history is, to say the least,

highly equivocal. Actually, insofar as legislative history is any guide in this case, it tends to support the state's jurisdiction.

In this connection it is important to have in mind the factual background in which Congress was acting. The fact is that state courts and boards have habitually, and as a matter of course, acted in fields in which the National Labor Relations Board had but declined to exercise jurisdiction. As the Board itself has said:

> "The fact is that this Board, since the earliest days of the Wagner Act, has operated on the premise, which has court and legislative approval, that the Board has discretion to determine the circumstances under which it will exercise its jurisdiction over labor disputes. Prior to 1950, this discretion was exercised on a case-to-case basis, but it is a matter of history that the Board for years refused to assert jurisdiction over many establishments, such as retail stores, hotels, restaurants, taxicabs, local transit companies, and even the entire construction industry." *Breeding Transfer Co.* (1954), 110 N.L.R.B. 493, 495.

During all of these years state labor boards, such as the New York board, exercised jurisdiction over such industries as a matter of course, and their right to do so was never questioned.

Indeed, the Board itself clearly contemplated and intended in formulating its new jurisdictional standards in 1954 that the states should be free to exercise jurisdiction where the Board declined it. Thus in the Breeding Transfer Company case, *supra*, at page 497, the Board stated:

> "If one of the inevitable consequences of our action is to leave a somewhat larger area for local regulation of dis-

putes, we do not share our colleagues' apparent view that this is a sinister development."

Two minority members of the Board stated that allocating more power to the states was the *purpose* of the change in the jurisdictional standards under discussion. (PP. 501, 528.) The majority denied this, but did not deny that that would be its effect. Thus all agreed that the states apparently had the power to act where the Board would not, though some may have viewed the matter as not being certain. (P. 528). Those who thought the states ought not to have the power to act in a particular case would have remedied that situation, in their own view by having the Board itself assert its jurisdiction, but did not contend that there would be a "power vacuum." In *Bethlehem Steel Co. v. New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. ed. 1234, the National Board in an amicus curiae brief clearly stated its view that the states had and ought to have power to act in such cases. Significant portions of that brief are set out in Appendix C, *infra*, p. 55.

This Court also has led Congress to believe that the power to act in such cases remained in the states.

In *Consolidated Edison Company v. National Labor Relations Board* (1938), 305 U.S. 197, 223, 83 L. ed. 126, 137, this Court not only recognized the power of the states to act, but indeed said that the Board should in some cases take that very fact into account in determining whether to accept jurisdiction.

In *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. ed. 1154, the contention was noted by the Court and not rejected that, as in the railway rate cases, state power should be superseded in any event only after

the National Labor Relations Board had actually assumed jurisdiction.

In *Bethlehem Steel Company v. New York State Labor Relations Board* (1947), *supra*, while the majority did not pass upon the effect of a refusal of the National Labor Relations Board to exercise its jurisdiction, it did indicate that where the federal power has been delegated but lies dormant and unexercised, the mere delegation does not preclude the states from acting, and the three specially concurring justices interpreted the majority opinion as recognizing that the states can act where the Board declines to. The minority opinion, however, also interpreted the majority opinion as carrying an implication that cession agreements ceding jurisdiction over cases of which the Boards ordinarily would *exercise* jurisdiction were invalid. The minority thought the distinction unsound, but they nevertheless also thought the majority had made it.

Again in the Garner case itself (*Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228) and in the later case of *Building Trades Council v. Kinard Construction Co.* (1954), 346 U.S. 933, 98 L. ed. 423, this Court made it clear that the question of the power of the states to act where the Board would not had not been decided against the states and was at least left open.

Thus we find an established practice of state action, and rulings of this Court that were at least susceptible of the construction that it would not interfere with that practice. The failure of Congress to enact legislation changing this situation is an indication, for what it is worth, that Congress considered the practice to be satisfactory. At least it conveys no possible implication that Congress was acquiescing in a rule forbidding state action in such

cases, for there was no such rule.

The principal Senate Report upon which petitioners rely (Senate Report No. 986, 80th Congress, 2nd Session, Part I, pages 30 to 31) was concerned with the type of case actually presented in the Bethlehem Steel case and not with cases of the present type which were expressly excluded from the decision in that case. The problem presented to the Committee arose from the fact that Section 10(a) of the National Labor Relations Act, which was designed to take care of the problem raised by the Bethlehem case and to permit agreements of the type thought to have been forbidden in that case, had substantially failed of its object because of the limitations contained therein. The Committee in the language quoted on Page 19 of the Petitioners' Brief said that if the only remedy were to relax those restrictions the desirability of doing so appeared questionable. This language applies to the problems arising with respect to cession agreement of the type thought to have been forbidden by the Bethlehem Steel case and subsequently validated by Section 10(a) of the Act, not to cases of the type passed by in the Bethlehem Steel case and apparently left to the states by that case.

Moreover, the report shows that even on the subject considered by the report, no definite conclusion was reached. The very language quoted by the petitioners shows this, and in the very next paragraph of the report the Committee stated that it intended to explore the matter further before making any recommendations.

The petitioners also refer to Senate Bill 2650 of the 83rd Congress, and make some statements about it which are erroneous in nearly every detail. That bill was a general one, designed to enact a number of revisions in the Labor Management Relations

Act of 1947 in accordance with recommendations of the President of the United States. Senate Report 1211 on the bill shows that, contrary to the statement of the petitioners, the bill as reported out by the Committee did contain a provision to add Section 6(b) to the Act to carry out the recommendation of the President that in cases such as the present "it should be *made clear* by legislation that the States are free to act." (Italics added.) (Senate Report No. 1211, 83rd Congress, 2d Session, pp. 8 and 9. This appears also from the summary of the reported bill at 100 Cong. Rec. 5832.) The clarificatory nature of the amendment is emphasized by the fact that it expressly authorized the long established power of the Board to decline jurisdiction in the first place. The report also recommended adding a new subsection 14(c) to the Act which would have given the states power to act in other cases in emergencies. Senator Goldwater proposed a different Section 14(c) which would, among other things, have overruled the Garner case in its entirety. (100 Cong. Rec. 5840, 5994.) The Bill was eventually recommitted—not as petitioners say, to include a provision covering situations of the type involved in this case "should a majority of the Committee so desire"—but rather after a debate principally concerned with the fact that other amendments not recommended by the President had not been considered by the Committee. The debate commenced on 100 Cong. Rec. 5826, and continued thereafter from day to day until the entire bill was recommitted. The proposed versions of Section 14(c) were occasionally mentioned in the discussion, but 6(b) rarely, if at all. It is apparently the very drastic amendment of Senator Goldwater that petitioners refer to when they say the Bill was recommitted to consider an amendment. This vote is reported at 100 Cong. Rec., Page 6202.

It is noteworthy that although, of course, the Congress has been reluctant to extend the power of the federal courts to issue injunctions, which was severely limited by the passage of the Norris-LaGuardia Act (Title 29, U.S. Code, Sections 101 et seq), the petitioners have been unable to cite any single instance of a statement on the floor of Congress or in a Committee Report, of an intention or desire to limit the power of *state* courts over labor controversies.

While, therefore, the legislative history may not be such as, standing alone, to indicate clearly the intent of Congress one way or the other, it is clear in the context and in the light of the history and purposes of the National Labor Relations Act and in particular the Labor Management Relations Act of 1947, that Congress could not have intended to preclude the states from acting in cases in which the National Labor Relations Board declined to, and that to the contrary Congress at all times felt it to be desirable that the states should have that power, even though there may sometimes have been uncertainty in the minds of various members of Congress as to which way this Court would rule on the subject in the absence of specific legislation.

C. *Allowing the states to act will further, not hinder the purposes of the Act.*

Petitioners cite four dangers that they say will result from permitting the state court to act. Three of these four dangers are ones which might indeed result in another situation—namely where the National Labor Relations Board has not and there is reason to believe will not refuse to take jurisdiction. None of these three has any application where the Board has made it clear

that it will refuse to exercise its jurisdiction. Thus petitioners say that to permit the states to act would (1) conflict with the pattern of regulations imposed by the Act, (2) conflict with the Act's policy of protecting concerted activities, and (3) destroy the "balance" of the Act. These untoward consequences are to a certain extent the inevitable result of the refusal of the Board to exercise jurisdiction; but granted that refusal they would be increased by a rule prohibiting state action and alleviated to the extent that the states are permitted to and do exercise their own jurisdiction.

The fourth untoward consequence urged by petitioners is that to permit the states to act would cause "intolerable confusion." The obvious fact is that whatever confusion would be caused by permitting the states to act would be exceeded many times by denying them the power to do so.

1. *State action will assist in carrying out the federal pattern of regulation.*

Clearly, since the Board will not take jurisdiction, the state action does not involve any actual or potential conflict with orders of the Board. If at a later time the Board should change its rule or change its mind and take jurisdiction, the state court's order would simply be superseded, just as a prior order of the Board itself would be, and no conflict would develop.

Petitioners therefore assert that even though the Board declines to act there can be a conflict with the policy of the Act because it may chance that the decision of the state court would be different from that which the Board would have rendered had it accepted jurisdiction. This possibility no doubt exists, but it

can be minimized, if this Court so decides, by a holding that the state court or board must conform its decision to the federal rules of substantive law. It is, moreover, only a possibility and one of a type this Court has said should not be anticipated. *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 746, 86 L. ed. 1154, 1163. If on the other hand the state courts and boards are not permitted to act, then there is a *certainty* that the policies of the Act will not be accomplished and will be completely frustrated and defeated in all such cases.

The petitioners cite as an example of the potential conflicts between the state and federal policy the fact that the trial court in the present case determined the question of representation by evidence, rather than by an election. There are three answers to this:

1. It is better to determine such questions by evidence than not to determine them at all;

2. The petitioners did not ask the Court to hold an election; and

3. There was no genuine issue on the question of representation.

In the present case the finding that the petitioners did not represent the employees was clearly correct. The unions presented no evidence that they had been designated by even one of the employees. (Paragraph IV of the Findings, R. 14.) The entire record shows that the question of whether the employees actually had designated the unions as their representatives was not even raised at the trial. The only issue even suggested by the petitioners on the question of representation involved an insinuation that the respondents influenced their employees against the unions. They did not plead that there was any *improper* influence and

since they failed to prove any coercion, the trial court found that there was none. (R. 314.) However, under the National Labor Relations Act this whole subject would be immaterial. A union cannot be recognized as the representative of the employees, and a union shop contract cannot be signed with it, unless the union *has* been designated by the employees; and the reasons for the failure of the employees to designate the union are quite immaterial if they have not done so. Influence brought upon the men by the employer might or might not be improper, depending upon the circumstances, but the impropriety, if any, of the employer's conduct does not under the federal Act fill the lack of a proper designation.

Thus in the present case, no court or board could have reached a different result on the question of designation.

The petitioners also suggest that there was no agency to determine what would be an appropriate unit for purposes of collective bargaining. In the present case the unit was the one selected by the petitioners themselves, and there was no issue at the trial as to the appropriate unit.

The present case is a good example to show that the type of situation in which the Board declines jurisdiction will ordinarily not involve the complexities which might result in a decision other than that which the Board would have made had it accepted jurisdiction. However, even if this were not so, it is surely better to have an occasional divergence from what the Board would have done than to have the certainty of a divergence in every such case by making a rule that nothing can be done.

2. *State action is necessary to carry out the Act's policy of protecting employee activities.*

Petitioners assert that the rights guaranteed by Section 7 of the National Labor Relations Act are protected not only against employer action but against state action, citing *Hill v. Florida* (1945), 325 U.S. 538, 89 L. ed. 1782. If this is so, it is easy to vindicate these rights as against the state by striking down any state action which interferes with them. This, in fact, was what was done in the Hill case itself. Moreover, as this Court said in *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 746, 86 L. ed. 1154, 1163:

> "Nor will we assume in advance that a state will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress."

It is not necessary, in the name of protecting employees against the state, which the Act does not expressly provide for, to leave them utterly defenseless against the very conduct of employers as well as of unions against which the Act is specifically directed.

A paramount purpose of the Act is to protect the employees against coercive actions by employers and by unions. That purpose cannot be carried out if the states are denied the power to act when the National Labor Relations Board declines to assume jurisdiction.

Indeed, the argument of petitioners on the subject of possible conflict with the policy of the Act regarding protected activities for the most part amounts to no more than an argument that this Court has held that states may not interefere with such activities. It completely overlooks the fact that the activity involved in the case was not a protected activity and that no pro-

tected activity was in fact enjoined.

Petitioners rely heavily on *Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228, which, as they themselves point out, was intended to avoid the divergence of result that might be reached as between different tribunals in the same field if state action was not precluded. Neither the reasoning nor the holding applied where such divergence is not possible because the federal agency declines jurisdiction, and neither the reasoning nor the holding would justify this Court in declaring free that which Congress has declared to be forbidden. This is in fact shown by the very language quoted by petitioners from the opinion in that case. Thus as they point out, this Court in the Garner case remarked:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (346 U.S. at 500, 98 L. ed. at 244.)

Thus, the Court in the Garner case held that the states could not declare such conduct to be free. Certainly the obstruction to the federal policy referred to by this Court in the Garner case would be no less if this Court declared the prohibited conduct to be free than it would be if the State were permitted to do so.

No rule can be justified on the premise that state action, forbidden in any case only by implication, could obstruct interstate commerce or interfere with the purposes of the Act while conduct of unions or of employers expressly found to be injurious, and for that reason expressly forbidden, does not so obstruct or interfere

with commerce or interfere with the purposes of the Act. And yet it would be necessary to hold not only that the state action would result in a great interference but that Congress so found in order to justify the inference that states are forbidden to act.

The National Labor Relations Act does not *require* the state to act when the Board declines jurisdiction; but when the states choose nevertheless to act in accordance with the National Labor Relations Act they are to that extent carrying out, not obstructing, the purposes of the federal law; and the petitioners are asking this Court to obstruct those purposes by preventing such action.

3. *State action in cases where the Board declines to accept jurisdiction will not destroy the "balance" of the Act.*

The argument of petitioners as to what they call the "balance" of the Act amounts to no more than that the states, if allowed to act at all, may enforce some rights given by the Act, but not others, or to put it conversely they may prevent some wrongful and injurious conduct but not all wrongful and injurious conduct. It is perhaps not novel for one wrongdoer to complain that another is not or may not be punished or prevented from his wrong-doing, but it is somewhat novel to expect a court to be swayed by such a complaint in its decision as to the law. Petitioners urge in support of their complaint that the Act constitutes a deliberate weighing of labor and management rights and duties which a state might upset. This contention is based upon a false premise. The Act insofar as relevant to this case is designed, according to its own statement quoted above, p. 15, to protect certain rights of employees from infringement by *either* employer or union. To the extent that the Board refuses to enforce these

rights and the state fails to supply the lack, the policy is not carried out, but to the extent that the state enforces some rights the policy of the act is promoted, even if it fails to enforce others.

4. *Confusion will be avoided by permitting the state to act.*

Whatever may be said of the uncertainty involved in the criteria of the Board for accepting and declining jurisdiction, it is eliminated where the Board has actually acted to decline jurisdiction. Moreover, this asserted uncertainty is as nothing to the uncertainty involved in letting the jurisdiction of state courts and Boards depend upon the question whether the business involved affects interstate commerce sufficiently to bring the case within the constitutional power of Congress. Yet that is what would be involved in a holding depriving the state court of jurisdiction in this case. This Court has held that the powers of the Board conferred by Congress extend as far as the power of Congress given by the Commerce Clause extends. *National Labor Relations Board v. Fainblatt* (1939), 306 U.S. 601, 83 L. ed. 1014; *Polish National Alliance v. National Labor Relations Board* (1944), 322 U.S. 643, 647, 88 L. ed. 1509, 1514.

The constitutional question of the extent of the power of Congress under the Commerce Clause to regulate local and intrastate activities is indeed difficult, and the line between what may and what may not be regulated by Congress is an extraordinarily shadowy one. It would be productive of enough problems to hold that substantive questions such as the rights granted by the National Labor Relations Board must be determined in each case by reference to this line. To hold in addition that the jurisdiction of state courts and boards depends upon it would be many times

worse. If substantive questions depend upon it, litigants may wonder whether the judgment rendered in a particular case is right or wrong. If jurisdiction depends upon it they must wonder also whether the judgment is valid. And no court below this one could give the answer.

IV

THE DECLINING OF JURISDICTION BY THE BOARD IS IN EFFECT A HOLDING THAT THE CASE SHOULD BE LEFT TO STATE ACTION.

The ground upon which the National Labor Relations Board declined jurisdiction was simply that the case was not important enough in relation to interstate commerce for it to act. The ground for declining jurisdiction amounts to a holding that the case should be left to the states. Indeed, Congress gave the Board no power to decide that the employees or employers should be deprived of rights guaranteed to them by law.

The ground of the refusal to exercise jurisdiction was that the purpose of the Act would not be effectuated by the Board's intervention because the impact of the situation on interstate commerce was too small for the conduct involved to cause a substantial obstruction to interstate commerce.

It has never been doubted that the Board has the right and power to decline jurisdiction on this ground. This Court has, in fact, stated that it acted quite properly in doing so. *National Labor Relations Board v. Denver Building and Construction Trades Council* (1951), 341 U.S. 675, 684, 95 L. ed. 1284, 1293. In *Pol-*

ish National Alliance v. National Labor Relations Board (1944), 322 U.S. 643, 648, 88 L. ed. 1509, 1515, this Court in connection th the power of the Board to determine its own jurisdiction, said:

> "Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress."

Since the Board is a creature of Congress its powers are derived from Congress, and the ground upon which its ruling is based must be held to be authorized by Congress. Thus the agency vested by Congress with the power to make a decision that the case is too small to justify federal intervention has done so. This necessarily involves the conclusion by the Board acting under the authority of Congress that state action was not inconsistent with the purposes of the federal statute.

V

THE CONTENTION OF THE PETITIONERS RAISES SERIOUS CONSTITUTIONAL QUESTIONS

The National Labor Relations Act purports not only to extend to industries which are engaged in interstate commerce but also to industries which merely affect interstate commerce. In fact, the finding of the trial court in this case was simply that the business of the respondents affected interstate commerce, not

that they were actually engaged in such commerce. The power of Congress over businesses affecting interstate commerce, unlike the power to regulate interstate commerce itself, which is conferred by Section 8 of Article I of the Constitution of the United States, is an implied power. It results from the necessities of the case, and not for its own sake. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1, 38, 81 L. ed. 893, 912. And as this Court said with reference to the application of the National Labor Relations Act to intrastate activities, "The justification for the exercise of Federal power should clearly appear." *Consolidated Edison Co. v. National Labor Relations Board* (1938), 305 U.S. 197, 223, 83 L. ed. 126, 137. See also *Florida v. United States* (1931), 282 U.S. 194, 75 L. ed. 291.

The Congress in passing the National Labor Relations Act has asserted that it is necessary to regulate and prohibit certain conduct in industries affecting commerce in order to protect interstate commerce. This Court has in the Jones & Laughlin case held that this declaration by Congress is justified.

It does not at all follow that Congress would have the power to say that activities which merely *affected* commerce should go entirely unregulated simply because the National Labor Relations Board found that the impact on commerce was not sufficient to justify its assuming jurisdiction. Such a statute, in the light of such a finding by the Supreme Court, would clearly exceed the powers of Congress. If Congress had actually intended this result and expressly provided for it, we submit that the statute so providing would be unconstitutional because not only is it clear that such a prohibition is not necessary to protect interstate commerce, but the prohibition of state action would by hypothesis apply to an area in which the Board acting as the agency of

Congress had said there was no need for any regulation to protect interstate commerce.

Under the circumstances we submit that the regulation would violate not only the Tenth Amendment to the Constitution of the United States but also the due process clause of the Fifth Amendment. Such unreasonable legislation would not constitute due process of law.

VI

THE JUDGMENT FOR DAMAGES IS CLEARLY JUSTIFIED UNDER THE PRIOR DECISIONS OF THIS COURT.

This question, be it noted, is not one covered by the Statement of Questions Presented, either in the Petition for Certiorari, or in Petitioners' Opening Brief.

This Court in the *United Construction Workers v. Laburnum Construction Corporation* (1954), 347 U.S. 656, 98 L. ed. 1025, held that the National Labor Relations Act does not prohibit the states from enforcing a common-law action for damages for conduct prohibited by the Act. For the reasons already pointed out this case is, insofar as the damage question is concerned, precisely such an action. See the discussion in Part IV, supra.

Petitioners' reliance upon Section 303 of the Labor Management Relations Act, which creates a cause of action and grants to the state courts jurisdiction over it, is misplaced. Nothing in that Section implies any intent to deprive the states of jurisdiction which they otherwise would have had.

VII

THE BOARD DID DECLINE TO EXERCISE JURISDICTION.

The Board in 1950 officially announced its intention and policy of declining to exercise jurisdiction in cases such as this. Such an announcement cannot be supposed to have been intended as an idle act. It was, in effect, notice to unions, employers, and state agencies to enable them to shape their conduct. At the very least it shows that appeal to the Board in such cases would be futile. The Board in its amicus curiae brief in the Bethlehem Steel case expressly took this position. See appendix C.

The Board acting through its Regional Director dismissed a representation proceeding in this very case. Such action was under an authority duly delegated to the Regional Director. Title 29, United States Code of Federal Regulations, Sections 6 and 101.17.

The general policy of the Board with respect to jurisdiction makes no distinction between an application to determine representation and one complaining of an unfair labor practice. In *C. A. Braukman, et al., dba Screw Machine Products Co.* (1951), 94 N.L.R.B. 1609, the Board said:

> "True, the Board has not heretofore considered the instant complaint case. However, because the Board does not, with respect to the question of jurisdiction, differentiate between representation and complaint cases, we believe that dismissal of the . . . . . representation case on jurisdictional grounds . . . . . was in effect, notice to all parties concerned that any complaint case based on alleged unfair labor practices . . . . . would similarly be dismissed." (P. 1611.)

(See also *National Labor Relations Board v. Guy F. Atkinson Co.* (1952), 195 Fed. 2d 141.)

In answer to this petitioners point out that in the first instance it is the General Counsel of the Board who decides an appeal on the question of jurisdiction in an unfair labor practice case whereas the Board does so in a representation case. They overlook, however, that even in an unfair labor practice case, if the General Counsel accepts jurisdiction, the Board can still decline it when the case gets to the Board. We submit that the statement quoted above from the Braukman case was intended by the Board to obviate any doubt on this very point.

Petitioners also suggest that respondents should have appealed to the National Labor Relations Board from the decision of the Regional Director declining jurisdiction. In the first place, as the Supreme Court of California pointed out, such an appeal would have been futile in the light of the expressed policy of the Board. The Board had made general pronouncements (press releases dated October 6, 1950 and July 14, 1954; see Appendix B) that it would exercise jurisdiction over a retail enterprise only when that enterprise had a direct inflow of material valued at $500,000.00 a year or an indirect flow valued at $1,000,000.00 a year. These standards were discussed and explained in *Breeding Transfer Company* (1954), 110 N.L.R.B. 493. The 1954 standards as to retail stores were first applied in *J. R. Knott, et al., dba Hogue & Knott Supermarkets* (1954), 110 N.L.R.B. 543. The 1950 standards as applied to retail stores were first applied in *Dorn's House of Miracles, Inc.* (1950), 91 N.L.R.B. 632; and *Federal Dairy Co., Inc.* (1950), 91 N.L.R.B. 638. In view of the evidence and the finding that the inflow of the respondents in this case did not exceed $250,000.00 a year an appeal would obviously

have been futile.

The Board itself has treated a withdrawal of a petition at the suggestion of its local agents as constituting a bar to subsequent unfair labor practice charges under the rule of the Braukman case, even though there never had been any formal dismissal of the proceedings even by the Regional Director. *John Almeida, Jr., dba Almeida Bus Service* (1952), 99 N.L.R.B. 498. In the Almeida case the original withdrawal was followed by proceedings before the Massachusetts Labor Relations Commission. The National Board noted this fact in considerable detail and with apparent acquiescence.

Petitioners suggest in this connection that the doctrine of exhaustion of administrative remedies has some application to the case. The doctrine of administrative remedies, however, has never been held to be a constitutional doctrine capable of allocating power between the states and the Federal Government. It is a rule applicable where an attempt is made to institute a legal attack upon an administrative decision designed to prevent unnecessary judicial interference with the proceedings of administrative agencies at their early or intermediate stages when there is still a chance that the administrative agency will render such interference unnecessary by itself correcting the asserted error. The case cited by petitioners on this point, *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41, 82 L. ed. 638, involves a typical attempt to induce the court to indulge in such an interference with the administrative processes. The rule is that in such a case it is necessary first to exhaust whatever administrative remedies are available to get that administrative decision changed. In the present case no attempt was made to challenge the validity of the administrative decision nor its correctness. It was unques-

tionably correct, and an attempt to challenge it would have been futile, as the Supreme Court of California observed. (R. 49.) Petitioners cite no authority for the proposition that the doctrine of exhaustion of administrative remedies applies to such a case.

Moreover, this is not merely a case where the choice is between an administrative tribunal and a court. The position of the respondents is not merely a lack of jurisdiction in the particular court as distinguished from some administrative tribunal but rather a lack of jurisdiction in the State of California itself to apply any remedy to the situation. The arguments of petitioners, if they were sound, would for the most part apply even though the State of California had set up an administrative tribunal and the proceedings now under attack had been conducted by that tribunal.

The question of the power of a state to act depends upon constitutional questions and upon the interpretation of acts of Congress. We have been cited to no case holding that it can depend upon such technicalities as the exhaustion of administrative remedies. We submit that such a doctrine ought not now to be created.

It seems almost superfluous to add that the remedy by appeal to the Board was hardly an adequate one, in view of the announced policy of the Board and the obvious correctness of the Regional Director's ruling. This Court has pointed out that where the administrative remedy is inadequate, resort to the courts is proper. *Steele v. Louisville & Nashville Railroad Co.* (1944), 323 U.S. 192, 205, 206, 89 L. ed. 173, 185. In the present case such an appeal would obviously have been an idle act, and requiring it in such cases would serve only to delay justice, sometimes to the extent of denying it.

CONCLUSION

For the reasons above set forth the decisions of the courts below were correct, the case was one within the jurisdiction of the state, and the decision should therefore be affirmed.

Respectfully submitted,
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APPENDIX A

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8

The Congress shall have Power . . .

. . . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

AMENDMENTS TO THE CONSTITUTION

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES

Section 1 of the National Labor Relations Act (Title 29, U.S. Code, Section 151) is set out in part in the body of the brief, p. 15.

National Labor Relations Act, Section 7 (Title 29, U. S. Code, Section 157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

National Labor Relations Act, Section 8 (Title 29, U. S. Code, Section 158)

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) . . . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . . .

National Labor Relations Act, Section 9 (Title 29, U. S. Code, Section 159)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of

collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

. . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

. . . . .

National Labor Relations Act, Section 10 (Title 29, U. S. Code, Section 160)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor dis-

putes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

REGULATIONS

Title 29, United States Code of Federal Regulations, Section 6

Under the general supervision and direction of the General Counsel the Regional Directors have the following authority:

. . . . .

(c) To decline to issue a complaint or a Notice of Hearing, subject to the right of the aggrieved party, in the case of a complaint, to appeal to the General Counsel, and in the case of a Notice of Hearing in a representation case, to appeal to the Board. . . . .

Title 29, United States Code of Federal Regulations, Section 101.17

(a) Upon receipt of the petition in the Regional Office, it is docketed and assigned to a member of the staff, usually a Field Examiner, for investigation. He conducts an investigation to ascertain . . . (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, . . .

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate,

or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification, the showing of representation among the employees is insufficient to warrant an election under the 30 percent principle stated in paragraph (a) of this Section.

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If, despite the Regional Director's recommendation, the petitioner refuses to withdraw the petition, the Regional Director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D. C. The petitioner may within 10 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the Regional Director to take further action.

APPENDIX B

N.L.R.B. Jurisdictional Standards—1950
National Labor Relations Board

October 6, 1950 No. 342

N.L.R.B. Clarifies and defines Areas in Which it Will and Will Not Exercise Jurisdiction

The National Labor Relations Board today announced the establishment of standards which will govern its exercise of

jurisdiction under the Taft-Hartley Act.

The various "yardsticks" which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. . . . . .

The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution the Board will exercise jurisdiction over:

. . . . .

6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; . . . .

. . . . .

N.L.R.B. Jurisdictional Standards—1954.
National Labor Relations Board

July 15, 1954 R-449

N.L.R.B. Announces New Standards for Exercise of Jurisdiction.

The National Labor Relations Board today established new standards for determining whether the Board will take jurisdiction over cases involving retail stores, utility companies, transit systems, radio and television stations, newspapers, certain types of interstate companies, industrial service companies, and companies engaged in national defense work.

. . . . .

The standards announced today are in addition to the new standards announced by the Board June 30, 1954. Those announced today also modify earlier standards adopted by the Board in October 1950. The changes announced today follow:

A. For retail stores, the Board established two standards—one to govern in cases involving stores operating entirely within one state and the other to govern in cases involving chain stores operating in more than one state. The new standards are:

(1) A single independent retail store or a chain of stores operating entirely within one state will not come under the Board's jurisdiction unless the store involved in the case has

(a) purchases amounting to at least $1,000,000 a year coming to it directly from outside the state, or

(b) purchases of $2,000,000 a year coming to it indirectly from outside the state, or

(c) if the store ships $100,000 worth of merchandise into other states.

(2) A store which is part of a chain operating in more than one state will come under Board jurisdiction if

(a) the store meets either of the standards listed in (1) for intra-state stores, or

(b) the gross sales of the chain amount to $10,000,000 or more per year.

(The former standards for stores were $500,000 a year direct purchases or $1,000,000 indirect purchases, or $25,000 a year sales made outside the state.)

. . . .

APPENDIX C

Excerpts from Brief for the United States as Amicus Curiae in *Bethlehem Steel Company v. New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. ed. 1234.

(Page 66)

We have stated what we believe to be the unsettling effect of a concurrent state and Federal [67] jurisdiction over labor relations. That discussion presupposed that the National Board was actively exercising its authority, as it does in the major interstate industries and in most fields subject to its jurisdiction. . . . .

(Page 69)

In this field in which the National Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10(a) . . . . . The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are non-existent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction.

Since the states may take jurisdiction, however, only if the National Board declines to apply the National Act to the enterprise involved, a showing of such refusal to take jurisdiction by

the National Board is a prerequisite to the assertion of jurisdiction by the states. This does not necessarily mean [70] that a petition or charge must be filed with the National Board in each individual case. The National Board may announce a general policy of declining jurisdiction in an entire class of cases. . . . : In such cases the National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board . . . . ."